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MEMORANDUM FOR THE RECORD

SUBJECT : Electronic Surveillance Legislation; HPSCI Open Session  
Hearing on H.R. 7308 and Other Bills

On Tuesday, 10 January, the HPSCI held an open hearing on four House bills dealing with domestic electronic surveillance for foreign intelligence purposes: H.R. 7308 (Rodino, counterpart of S. 1566); H.R. 5632 (Kastenmeier); H.R. 5794 (Railsback); and H.R. 9745 (McClory). Attached at Tab A is a list of witnesses at that session which included the DCI accompanied by Tony Lapham, [redacted] George Cary, [redacted] and the undersigned. In attendance were members of the Subcommittee on Legislation -- Morgan Murphy (Chairman), Romano Mazzoli and Robert McClory -- and its counsel, Bill Funk, as well as Mike O'Neil. Chairman Boland, who also sits on the Subcommittee, was not present.

Chairman Murphy and McClory both read from prepared statements (see Tab B). McClory mentioned in his statement that he had problems with the judicial warrant requirements of H.R. 7308, the Administration's sponsored bill, and other aspects of the bill. As examples, he mentioned that H.R. 7308 would not permit surveillance of an individual who is suspected but not proven to be in contact with foreign intelligence groups or U. S. citizens who are recruitment targets of such groups. He also was concerned with the "unrealistic" standards for information sought by surveillance.

Attorney General Bell was the first witness of the day (see his prepared statement at Tab C). The questions and responses were as follows:

1. (Murphy) Can't we do something about the non-criminal standard? Would you accept a compromise in which there would be a statutory presumption of the violation of the espionage laws, with respect to the activities covered by the non-criminal standard in H.R. 7308?

Answer: I have been the chief proponent of the non-criminal standard and have studied this question closely to see if there can be a compromise. However, I have not yet decided if a compromise can be achieved, and if one can, what its nature will be. I will consider your proposed solution and will get back to you in writing.

2. (Murphy) Under the targeting standard which permits the targeting of U. S. persons engaged in clandestine intelligence activities, could a U. S. newspaper editor who accepts propaganda for publication from the KGB be surveilled under the bill?

Answer: Your hypothetical poses difficult First Amendment problems and I must consult with Assistant Attorney General Harmon. (He thereupon turned to Harmon, but Murphy did not wait for an answer and went ahead with his other questions.)

3. (Murphy) Under the bill, does the Chief Justice have the discretion to choose whichever seven judges he wishes?

Answer: Yes, but I advocate that the judges come from the Washington area for reasons of efficiency. My principal concern is with the selection of judges and their personnel clearances and other security qualifications. I intend to help the Chief Justice in exercising his responsibilities.

4. (Murphy) What do you think about the charge that judges are insulated from real life and may not be suited to such a specialized discipline as intelligence?

Answer: When I was a judge, I had an opportunity to deal with intelligence matters and found that they were no more difficult than other problems that judges face every day. I would have problems, however, with finding safe places to keep sensitive papers. In fact, in a recent case, I suggested to a district court judge that the papers upon which he was to make a ruling ultimately be kept for safekeeping in the FBI on the basis of a "trust receipt."

5. (Murphy) Don't you think it might be a good idea in the post Watergate atmosphere to select at least some judges from west of the Alleghenys in order to assure the public that these matters are not entirely controlled from Washington.

Answer: I am amenable to this suggestion and will look into it. In stating that I would suggest that Washington area judges be chosen, I was concerned with the need for timely action in getting a response to warrant applications and avoiding or creating a burden for judges in far corners of the country.

6. (McClory) Doesn't H.R. 7308's warrant procedure involve foreign embassies and governments as well as U. S. persons? Isn't it true that as to foreign powers no real probable cause need be shown?

[McClory did not wait for Bell to respond.]

7. (McClory) You aren't violating the rights of U. S. persons now, are you? So what we are really projecting is imagery and not reality?

Answer: No. We are not violating the rights of U. S. persons, but we are trying to build a system of trust.

8. (McClory) So what we are really talking about is accountability. Do you object to my bill which requires reports to Congress on a quarterly basis?

Answer: No.

9. (McClory) Do you think the Fourth Amendment applies to foreign powers? Aliens?

Answer: No, but it at least applies to PRA's. We will be happy to prepare a detailed written response to your question.

10. (McClory) What about the Vienna Convention? Isn't it true that you can't convict diplomatic personnel but can surveil them? Wasn't it the policy of the last Administration that we had a right to surveil diplomatic establishments under the Vienna Convention?

Answer: Well, there is some doubt about what the Vienna Convention means in this area. We are not interpreting the Vienna Convention differently than anyone else.

11. (McClory) The FBI has indicated that the KGB influx in this country is increasing and is very great at present and that the Bureau may not be able to handle it. Do you question that?

Answer: That is right, there is a problem.

12. (McClory) Do you agree with the SSCI amendment which requires a statement as to whether there has been a physical entry?

Answer: Yes.

13. (McClory) Consider this hypothetical. In relation to the emergency surveillance provision of H.R. 7308, what if an FBI agent gets a tip from a confidential informant that a foreign agent will get instructions via a phone call in a phone booth from the KGB in 20 minutes? Would the bill permit you to tap that line?

Answer: If you could find me in 20 minutes to get approval.

14. (McClory) What about wiretaps against organized crime under Title III? How frequently do you deny warrant applications in that context?

Answer: I would have to look to the ACLU study on that last summer, but even that was incorrect because it did not consider the requests that were turned down by me or the head of the Bureau. It only concerned itself with disapprovals by the courts. I would be happy to research that question, however, and give you a response.

15. (McClory) Doesn't the Administration's bill invite the judiciary to second guess the executive branch? Don't you think that bringing courts in may be overreacting?

Answer: I agree, but this legislation isn't . . .

16. (McClory) Do Canada and Great Britain have comparable laws.

Answer: No.

17. (Mazzoli) Last summer Vice President Mondale mentioned in his remarks before the ABA Convention that no government official is above the law and no searches should be made without probable cause to believe that a crime is about to be committed. Do you go along with these thoughts?

Answer: No, I do not agree with the Vice President. I am seeking a compromise on the issue of non-criminal standard but have not found it yet. In my view a criminal standard is not necessary for foreign intelligence surveillances.

18. (Mazzoli) How is the revision of the espionage laws coming along? Can't we resolve the non-criminal standard controversy through such a revision?

Answer: The revision of the espionage laws is likely to take many years and would be at least as controversial as the non-criminal standard in this bill. We can't jeopardize national security while we debate the espionage laws. Even if they were revised, you wouldn't be sure of them until the Supreme Court passed on their constitutionality. Taking a look at (iii) (non-criminal standard), it is as close to a crime as you can get. I believe its tantamount to a crime.

19. (McClory) Does Congress have the authority to provide for security procedures and to tell the judge what he is not to discuss outside the court room?

Answer: The judges are, of course, have to be cleared. However, I am more concerned with the other court personnel.

20. (McClory) What do you think about having the executive branch provide the clerical personnel as was suggested by the Supreme Court in the Keith case?

[No answer.]

21. (McClory) Isn't there no real assurance that the executive branch will not abuse the procedures under the statute? Aren't you really passing the buck to the courts? Won't the procedures merely provide that the executive can do what it wants to, and that the legislation would be used to cover it up?

Answer: No.

22. (Murphy) How many U. S. persons have been the subject of foreign intelligence surveillance in the U. S. since you have been Attorney General?

Answer: Zero.

The DCI, accompanied by Tony Lapham, was the second witness (see DCI's prepared statement at Tab F). The questions and responses were as follows:

1. (Murphy) Would the Administration's bill in any way hinder the operations of the Intelligence Community?

Answer: There are risks but on balance they are worth it in terms of assurances to the American public.

2. (Murphy) Do you have any ideas about the selection of judges?

Answer: My primary concern is that they will keep secrets.

3. (McClory) The Administration's bill represents a substantial change from existing practices, doesn't it. You don't apply to courts now for counter-intelligence activities, do you? For example, tailing individuals, etc.?

Answer: No.

4. (McClory) What about security procedures? There is no question about the fact that more persons will have access to sensitive information?

Answer: Right.

5. (McClory) Do you think the executive branch should supply clerical personnel? Would you feel safer if it would?

Answer: Yes, absolutely.

6. (McClory) There aren't any violations taking place now are there? Do you think we really need an additional law?

Answer: No violations are taking place; we are merely tightening existing controls.

7. (McClory) I would like to point out that under the Administration's bill you really don't have to identify the target. You can get away with merely describing the target.

8. (McClory) If the main purpose of all these Administration bills is to provide for accountability, wouldn't it be satisfactory to report to Congress?

Answer: Reporting to Congress, of course, does supply some measure of accountability but that kind of oversight is ex post facto. The bill provides for prior oversight by the judiciary which the Congress could not do without raising serious constitutional questions. Therefore, I believe the two checks--one, by the judiciary, and the other, by the Congress--will compliment each other.

9. (McClory) Do you have any objections to providing quarterly reports to the Congress?

Answer: On principle, no, but I would like to think about that. I am against unnecessary proliferation of sensitive information in papers and what you are suggesting would increase such proliferation fourfold.

10. (Mazzoli) Did CIA participate in the drafting of this legislation and did you have an opportunity to criticize things in the bill?

Answer: Yes. We did participate and it is our belief that this is the best bill under the circumstances.

11. (Mazzoli) Are there current guidelines on overseas surveillances, both of U. S. persons and non-U.S. persons.?

Answer: Yes, there are Attorney General guidelines with respect to surveillance of U. S. persons abroad. Of course, there are other internal procedures under which I review surveillances against non-U.S. persons.

12. (Mazzoli) What do you think about legislation covering surveillances abroad with respect to Americans or foreign nationals?

Answer: The Administration is now preparing legislation to protect Americans abroad. The subject, however, is sufficiently different and different treatment is called for. The problem there is one of cooperation of foreign intelligence surveillances and the increased risk of disclosure. In my statement I mentioned that in my view there was nothing in the Administration's bill which would frustrate legitimate government purposes. However, in the overseas context my view on this point might be different for such legislation very well might frustrate surveillance abroad.

13. (Murphy) Would you have any objection to detailed statistical reporting requirements in the legislation as well as some access by the oversight committees to original documents?

Answer. No.

Admiral Daniel Murphy, Deputy Under Secretary of Defense for Policy and Deanne Seimer, General Counsel, Office of Secretary of Defense, DoD were the next witnesses (see their prepared statements at Tab D). Adm. Murphy in the portion of his prepared statement which he submitted for the record stated that the Department of Defense supported H.R. 7308 but nevertheless outlined a number of significant problems with the bill, to wit:

1. The extension of coverage beyond U. S. citizens;
2. The inclusion of beepers, television cameras, microphones<sup>\*</sup> and other surveillance devices;
3. The distinctions between entities openly acknowledged by a foreign power to be directed and controlled by it and those which are not;
4. Definition of foreign intelligence information (deemed essential, etc.);
5. The means by which information is to be acquired;
6. Judicial discretion to obtain additional information; and

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\* Apparently, DoD would exclude bugging in the coverage of the bill.

7. The SSCI amendment "prohibiting" dissemination in minimization procedures and the differentiation between the types of foreign surveillances as to the content of the order on types of information sought.

In his oral presentation, however, he proposed only two amendments--one dealing with definition of foreign intelligence and the second dealing with the means of surveillance. He stated that the amendment would require designation of the type of electronic surveillance equipment to be used which was somewhat different from his prepared statement which referred to a designation of the type of equipment to be used according to the categories described in sections 2521(b)(6). The questions and responses were as follows:

1. (McClory) Do you think that acceptable security procedures can be established by the executive branch?

Answer: Yes, but the judiciary may have the same problems with such procedures as the Congress has.

2. (Mazzoli) I can understand your amendment with respect to the means; however, I am troubled by your amendment dealing with definition of foreign intelligence information. Could you explain your reasoning?

Answer: Currently the "deemed essential" standard would make it very difficult for me to advise the Secretary of Defense as a potential certifying officer that every particular piece of information which is intended to be acquired by surveillance meets such a high standard. [He then went on into the "bits and pieces" theory.]

3. (Mazzoli) Why couldn't the "deemed essential" standard be consistent with the bits and pieces theory? In terms of the Fourth Amendment do you distinguish between U. S. citizens and aliens in this country?

[No answer.]

4. (Murphy) Do you have any objection to reporting the same sorts of statistics to the oversight committees that I asked the DCI about?

Answer: No, but I have some reservations with respect to the sampling of original documents. I would prefer to brief the committees rather than exchange paper for security reasons.

5. (Murphy) Do you favor an explicit reference in a statute with respect to the applicability of the Vienna Convention?

Answer: (Seimer) No, Mr. Chairman, we do not believe that such a reference would be necessary for the simple fact that the Vienna Convention does not apply to the activities which would be undertaken under the bill. We have an opinion of the Department of Justice that tells us so and I believe that is a correct opinion.

Carl H. Imlay, General Counsel, Administrative Office of the United States Court, submitted a prepared statement (see Tab E) in which he stated that there was a constitutional problem with designation of judges rather than courts under the Administration's bill and he offered a replacement draft of section 2523 which would establish a "special court of surveillance authorization." This special court would prescribe its own rules including security procedures and it would have discretion to disclose information to a defendant in a criminal prosecution.

The questions and responses were as follows:

1. (McClory) How do you feel about the executive branch establishing security procedures for the courts (clearances, access to in camera proceedings, etc.)? Would these procedures be constitutional?

Answer: Constitutionally, such procedures might be limited to access by individuals.

2. (McClory) What about breaches of security by judicial personnel?

Answer: There is, of course, the ultimate remedy of impeachment. In addition there is a Senate bill on judicial administration which provides for other sanctions. [The next judicial conference is being held on 2 and 3 February in New Orleans at which these points can be discussed if the House Subcommittee requests that it be discussed.]

3. (Mazzoli) What about an appellate court? I noticed that your proposal does not provide an appeal by the U. S. Government as does the Administration's bill.

Answer: My proposal is flexible in this regard. Such an appellate procedure could be provided for by a ruling of the court.

4. (Mazzoli) Couldn't your entire proposal be done by rule as well?

[No answer.]

After Representative Mazzoli concluded his questioning, Chairman Murphy adjourned the session until 9:00 the following morning.



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Attachments

cc: ✓OLC w/o atts  
SA/D/DCI/IC w/o atts